



Scottish Information
Commissioner

**Decision 132/2006 Mr John Egan and West
Dunbartonshire Council**

*Request for information relating to the closure of Milton Primary
School*

**Applicant: Mr John Egan
Authority: West Dunbartonshire Council
Case No: 200501202
Decision Date: 03 July 2006**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 132/2006 Mr John Egan and West Dunbartonshire Council

Request for information relating to the closure of Milton Primary School, including copies of emails with the subject heading "Milton Primary School". Information withheld under section 38(1)(b) (personal information), 36(1) (confidentiality) and 30(b)(i) and (ii) (prejudice to effective conduct of public affairs). Some information held on behalf of another person (section 3(2)(a)(i)).

Facts

In 2004 West Dunbartonshire Council (the Council) held two public consultation exercises regarding the closure of Milton Primary School. The first consultation was the subject of a legal challenge by parents who believed that there were flaws in the process used; the Council then carried out a second consultation. Milton Primary School closed in June 2004.

In January 2005 Mr Egan wrote to the Council and asked how much money had been spent in maintaining Milton Primary School since its closure. He also asked for copies of all emails sent between council officials during the previous year which were headed "Milton Primary School". This request was narrowed down to those emails relevant to the closure plans and the two consultations.

The Council provided Mr Egan with a list of charges incurred for property maintenance since the school's closure. It also provided copies of a number of emails relating to his request, but withheld others on the grounds that the information within them was exempt from disclosure under section 38 and section 36 of the Freedom of Information (Scotland) Act 2002 (FOISA).

The Council also stated that some emails relating to Mr Egan's request were held by the Council on behalf of another person and were therefore not held for the purposes of FOISA (section 3(2)(a)(i)).

After a further search of personal email archives requested by the investigating officer, another collection of emails relating in some way to Milton Primary School was retrieved and considered for release. Most were withheld under section 36(1) of FOISA (confidentiality) while some were withheld under section 30(b)(i) and (ii) (prejudice to the effective conduct of public affairs).



Outcome

The Commissioner found that West Dunbartonshire Council had generally complied with Part 1 of FOISA, although its initial search for information relating to Mr Egan's request had failed to retrieve a number of documents which should have been considered. The Commissioner found that the Council had not provided sufficient reason for applying the exemption in section 30(b)(ii) to one document, and had misapplied the exemption in section 36(1) to another document. The Council was required to release these documents to Mr Egan. During the investigation the Council decided that another document was not exempt under section 30(b)(ii) as originally argued, and agreed to provide Mr Egan with a copy. The Commissioner also found that the Council had not complied with section 16 of FOISA in its initial response to Mr Egan's information request.

Appeal

Should either Mr Egan or West Dunbartonshire Council wish to appeal against the Commissioner's decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Background

1. In 2004 West Dunbartonshire Council (the Council) held two public consultation exercises regarding the closure of Milton Primary School. The first consultation was the subject of a legal challenge by parents who believed that the process used was flawed. A second consultation exercise was then carried out. Milton Primary School finally closed in June 2004.
2. On 6 January 2005 Mr Egan sent an email to the Council asking how much money had been spent in maintaining Milton Primary School since its closure.
3. Mr Egan also asked for copies of all emails sent between council officials during the previous year which were headed "Milton Primary School". The Council asked him to be more specific, and Mr Egan explained that he wished to receive emails relevant to the closure plans for Milton Primary School and the two consultation exercises.



4. The Council replied on 31 January 2005, providing Mr Egan with a number of emails relating to his request (223 pages). It explained that in an attempt to provide as full an answer as possible, it had not confined the search to emails headed "Milton Primary School" but had also carried out "an advanced search" for any information relating to the school. Some of the information retrieved during the advanced search had not been deemed to be relevant to Mr Egan's request and had not been provided.
5. In its letter the Council explained how the search for relevant emails had been carried out, and advised Mr Egan that some emails created prior to August 2004 might be held in archived personal folders on individual officers' computers. The Council did not believe it would be feasible to ask every individual officer to conduct a search of personal folders.
6. The Council also stated that some emails had been withheld from Mr Egan. The Council did not cite the relevant section of FOISA as required by section 16; instead, it simply explained that the information was withheld either because it contained personal information about Council employees or third parties which would breach the Data Protection principles if disclosed, or because it was information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The Council noted that it did not consider the public interest in withholding the information to be outweighed by the public interest in disclosing it.
7. On 2 February 2005 Mr Egan asked the Council to review its response regarding his request for emails relating to the Milton Primary School closure. He was particularly concerned that he had received no emails dating from 8 April to 7 May 2004, as this was the period in which the Milton School parents had launched a legal challenge against the consultation carried out.
8. On 9 February 2005 the Council provided Mr Egan with a list of charges incurred for property maintenance since the school's closure. It apologised for the failure to address this part of Mr Egan's request in its previous response.
9. On 1 March 2005 the Council informed Mr Egan that, after review, it had decided to uphold its initial response to his request. The Council provided Mr Egan with another four emails which were said to have been omitted in error from the enclosures sent on 31 January 2005 (rather than being released as part of the review process).
10. On 28 March 2005 Mr Egan applied to me for a decision. In his letter he asked me to note the chronological gaps in the email correspondence released to him, and the lack of any emails from the former Director of Education or any of the elected council members. He also stated his belief (which was based on the statement of a Council officer) that the Council would have access to every email sent during the last 5 years.



11. The case was allocated to an investigating officer.

The Investigation

12. Mr Egan's application for a decision was validated by establishing that he had made a written request for information to a Scottish public authority, and had appealed to me only after requesting a review from the authority.
13. The investigating officer contacted the Council on 19 May 2005. The Council was advised that an investigation into the case would take place, and was asked to provide:
 - Its detailed analysis of sections 38 (Personal Information) and 36 (Confidentiality) upon which it had relied when withholding some information. The Council was asked to specify the subsections of the exemptions upon which it had relied
 - Information on the steps taken to trace emails with the subject heading "Milton Primary School", for the period 8 April to 7 May 04
 - Information on the electronic search capability of West Dunbartonshire Council's server.
14. The Council replied on 3 June 2005. It confirmed that it was relying on the exemptions in sections 38 and 36 of FOISA, and listed the documents variously withheld under sections 38(1), 38(2) and 36(1). The Council explained why these exemptions were believed to apply, and why it had taken the view that the public interest did not lie in disclosure of the information.
15. Regarding the electronic search capability of the Council's server and the search carried out for relevant emails, the Council advised that the search process used was as described in its correspondence with Mr Egan. The Council explained that new hardware and software had been installed in Council premises between May to June 2004. From that time, emails to and from the Council were automatically intercepted and a copy was archived before the message was passed to the user's inbox. The electronic tool allowing those archived emails to be searched was enabled in August 2004, and at the time of Mr Egan's request (January 2005) the largest server and some of the ancillary servers were operating with this tool.



16. However, the Council explained that only six out of its eleven mail servers were able to be searched in this way. For servers not included in the process the system was backed up on tape each month. These tapes are over-written in rotation.
17. The Council added that if an email was created and deleted between monthly back-ups, it would not be archived.
18. The Council had also searched all officers' email in-boxes, and confirmed that this search had produced a number of emails from the period before August 2004.
19. The Council was asked to carry out a search of the personal email archives of certain key officials. This was not practicable in some cases, as the staff concerned had moved on and their computers had been relocated. However, the search of one officer's email archive produced around 250 additional pages of emails relating in some way to Milton Primary School. The Council identified some documents for release to Mr Egan but took the view that most of the emails retrieved did not relate to Mr Egan's request, or were exempt from disclosure under section 36(1), section 30(b)(i), or section 30(b)(ii) of FOISA.

The Commissioner's Analysis and Comment

20. The investigation into this case focused on two issues:
 - a) Whether the Council's decision to withhold some of the information covered by Mr Egan's request was in compliance with FOISA.
 - b) Whether the searches carried out by the Council were sufficient to retrieve all information relevant to Mr Egan's request

The adequacy of the Council's search procedures

21. Section 1(1) of FOISA states that "A person who requests information from a Scottish public authority which hold it is entitled to be given it by the authority." In coming to a decision on an application it is therefore one of my responsibilities to examine whether or not an authority has considered all information that it holds in relation to an applicant's request when formulating its response.



22. In letters to my office dated 3 June 2005 and 8 February 2006, and in an email of 9 March 2006, the Council has provided detailed information about the search procedures used to retrieve emails and other information relating to Mr Egan's request.
23. Although one of the emails released to Mr Egan states that the Council keeps a record of every email sent for 5 years, the Council has confirmed that the officer responsible for the email was misinformed on that point.
24. Details of the search capabilities of the Council regarding emails sent between January and December 2004 are given in paragraph 15 above. I accept that the general email searches carried out by the Council were as extensive as possible given the limited ability to search for emails pre-dating August 2004, when new computer software and hardware were installed.
25. As noted in paragraph 16 above, only six out of the eleven mail servers in the Council could be searched for emails relating to Mr Egan's request. The Council has stated that it is not possible to comment with any degree of accuracy on what proportion of emails sent to and from Education and Legal & Administrative Services officers would have been routed through a specific server.
26. The investigating officer asked the Council whether it would be feasible to restore back-up data from the period before August 2004, when the search tool was enabled on the main Council server. The Council explained during that period the practice was to create backup tapes for each mail server every four weeks. These tapes were over-written in rotation, so that at the end of each four week period the data for that period would be overwritten. Only data for the four week period prior to the decommissioning of the servers would still exist, and the Council explained that restoring this data would be a hugely complicated process, requiring significant technical expertise and many hours of staff time, with only a slight possibility that any relevant information would be retrieved. I did not consider it reasonable to require the Council to carry out such an exercise.
27. The searches carried out by the Council in response to Mr Egan's request appear to me to have been thorough and sufficient to retrieve any relevant emails accessible on the email servers. I note that the Council extended its search to execute an advanced search for any information relating to Milton Primary School to ensure that nothing relevant to Mr Egan's request was missed. This involved searching on permutations of "Milton Primary School" within the body of the email text as well as in the subject headings.



28. The Council had informed Mr Egan that some emails pre-dating August 2004 might be held in staff's personal email archive folders, but that it was not feasible to require each member of staff to carry out a search of these folders for emails relating to Mr Egan's request. However, the investigating officer asked the Council to search the personal email archives of certain key officers. Some of these searches did not take place, for technical reasons which the Council has explained to my satisfaction.
29. I note Mr Egan's concerns that the searches carried out by the Council did not retrieve any emails from the former Director of Education on the subject of Milton Primary School. A search of this officer's personal email archive was requested, but I have accepted the Council's explanation of why this was not feasible. However, the former Director's secretary has confirmed that he rarely used his computer, and I accept the point made by the Council that email is only one form of communication used within the Council. It was also established that the former Director's secretary did not have a personal email archive set up on her computer.
30. As noted in paragraph 19, the personal email archive of one of the Council solicitors yielded a significant number of additional emails with the heading "Milton Primary School" or which related in other ways to the dispute over the school closure. After considering the contents, the Council found it appropriate to withhold most of these documents under section 36(1) of FOISA, with a small number of additional documents withheld under section 30(b)(i) or (ii). The use of these exemptions is examined later in this decision notice.

Conclusion

31. I accept that the general searches carried out by the Council for emails relating to Mr Egan's request were sufficiently thorough to retrieve any relevant information from accessible servers. I also accept that, by the time Mr Egan made his request, it is unlikely that back-up tapes would have held any emails from the period about which he is most concerned, 8 April to 7 May 2004: established procedures meant that back-up data from this period would have been overwritten. However, I would remind public authorities that the provisions of FOISA apply to all information that they hold, which includes personal email archives. I consider it reasonable for public authorities to include the email archives of key officials in searches carried out in relation to information requests.



Information not covered by Mr Egan's request

32. After clarification, Mr Egan's request to the Council was understood to include all emails with the heading "Milton Primary School" which related either to the closure of the school or to the two consultation exercises carried out ahead of that closure. Documents 9/58 – 9/114 are copies of emails which, although bearing the heading "Milton Primary School" were considered by the Council to fall outside the scope of Mr Egan's request, as they related to issues which arose after the school's closure, e.g. maintaining the school and the future plans for the building.
33. After examining these documents I accept that the information in these emails does not fall within the scope of Mr Egan's request, with the exception of documents 9/156 and 9/157. The emails in those documents have already been provided to Mr Egan (documents 4/144 and 4/145, as supplied to my Office).

Information withheld from Mr Egan

34. I have found it helpful to consider the remaining emails withheld by the Council in the following four groups:
- a) Emails which the Council considers to contain sensitive personal data which, if released, would breach the Data Protection principles and are therefore exempt under section 38(1)(b).
 - b) Emails containing advice given by a solicitor to their client or information passed to a solicitor by their client, withheld under section 36(1), sometimes on the grounds of "legal professional privilege".
 - c) Information withheld under section 30(b)(i) or (ii) on the grounds that it would substantially inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
 - d) Emails from an elected Council member, which the Council considers that it holds on behalf of the Councillor and which are therefore not "held" for the purposes of FOISA (sections 3(2)(a)(i)).

Emails withheld because contents included "sensitive personal information"

35. Documents 9/9 to 9/19 are emails which were withheld on the grounds that the information within them was sensitive personal data which, if disclosed, would contravene one or more of the data protection principles.



36. Documents 9/9 to 9/16 concern the employment of cleaning staff at Milton Primary School, and include details of the terms and conditions of named employees.
37. Section 2 of the Data Protection Act 1998 (the DPA) states:
- "In this Act 'sensitive personal data' means personal data consisting of information as to -
- (a) the racial or ethnic origin of the data subject,
 - (b) his political opinions
 - (c) his religious beliefs or other beliefs of a similar nature
 - (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
 - (e) his physical or mental health or condition,
 - (f) his sexual life
 - (g) the commission or alleged commission by him or any offence, or
 - (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings."
38. I have not found documents 9/9 to 9/16 to include information which would fall into any of the categories listed in section 2 of the DPA, and therefore I do not agree that the information withheld constitutes sensitive personal data, as defined by the DPA.
39. However, the information does meet the DPA's definition of personal data, in being data relating to a living individual who can be identified from those data. In deciding whether the Council was correct to withhold this information under section 38(1)(b) of FOISA, I must consider whether release of this personal data would breach the data protection principles laid down in the DPA.
40. The first data protection principle requires personal data to be processed fairly and lawfully.
41. The Information Commissioner's guidance on the consideration of the data protection principles provides examples of the issues which authorities should consider when assessing whether the release of personal data to a third party would amount to 'fair' processing. These include:
- Would the data subject expect that his or her information might be disclosed to others?
 - Has the person been led to believe that his or her information would be kept secret?



42. In my view, the disclosure of detailed information about an employee's rate of pay and terms and conditions of employment is generally regarded as confidential information which an employee would not normally expect to be disclosed.
43. Guidance issued by the Information Commissioner states that, "the more senior a person is the less likely it will be that to disclose information about him or her acting in an official capacity would be unfair." In this case the employees concerned are not remotely senior officers of the Council, and (on the basis of the Information Commissioner's guidance) it is therefore more likely that disclosing such information would be unfair.
44. In this case I have not found that disclosure would be unlawful, for instance by breaching a law forbidding disclosure or causing an actionable breach of confidence. However, as I consider that disclosure would be unfair, I have upheld the Council's decision to withhold documents 9/9 to 9/16 under section 38(1)(b) of FOISA. This is an absolute exemption which does not require me to consider the public interest in disclosing or withholding the information.
45. Part of the email correspondence in documents 9/17 and 9/18 has already been released to Mr Egan (document 4/56). I will therefore consider only the emails which have not been disclosed previously, when deciding whether the information withheld is exempt from disclosure under section 38(1)(b) of FOISA.
46. Documents 9/17 and 9/18 are emails about the employment status of the (unnamed) school crossing patrol person following closure of the school. The emails released to Mr Egan contain a request for advice about the post of school crossing patrol person at Milton Primary school, together with the reply received.
47. The emails withheld from this correspondence also relate to the employment of the patroller at Milton Primary School. At no point is the patroller identified by name.
48. I have taken the view that it is not necessary for the emails to refer to the crossing patroller by name in order for the information in those emails to constitute her personal data. All that is required by the DPA is for an individual to be identifiable from the data in order for it to be 'personal data'. In this case I think it is likely that the crossing patroller would be well known to local residents, and identified on the basis of their job title. I therefore uphold the Council's decision to withhold these emails under the exemption in section 38(1)(b) of FOISA.



49. The same principle applies to the information in document 9/19, which contains a request for advice from the Council's personnel department about the position of Milton Primary School staff after the school closure. The email does not give the names of the individuals concerned, but (as with the school patroller) I accept that the individuals might be locally identifiable through their job titles. I uphold the Council's decision to withhold this email under the exemption in section 38(1)(b) of FOISA, on the grounds that the disclosure of the information within it would breach the data protection principles.
50. Documents 11/81 and 11/84 relate to a pupil at Milton Primary School in the context of the closure. The information has been withheld under section 38(1)(b) of FOISA. I accept that the information in the emails is personal data which, if disclosed under FOISA, would breach the first data protection principle. I uphold the decision to exempt this information from disclosure. Document 11/175 duplicates the information in 11/84 and I consider that the same argument applies in respect of this document.

Emails withheld on grounds of confidentiality

51. Section 36(1) of FOISA allows a public authority to withhold confidential information about which a claim of confidentiality of communications could be maintained in legal proceedings. It covers advice from a solicitor to a client and information passed by a client to their solicitor, and this includes staff in a public authority taking advice from the solicitors employed within the same authority. In such a case the public authority, as client, has the right to waive confidentiality of communications and must waive it where it is in the public interest to do so, as this exemption is subject to the public interest test. The Council believes that many of the emails retrieved in its searches are covered by "legal professional privilege", and are therefore exempt from disclosure under section 36(1) of FOISA. These are discussed in the following paragraphs.

Documents 9/21 – 9/37

52. Documents 9/21 – 9/37 are an exchange of emails about an issue arising from the closure of the school. Most are administrative in nature but they include requests for legal advice.
53. Some of the emails within these documents were not part of any direct communication with the Legal Department; however, as these administrative emails can be seen to have become the subject of a request for legal advice, I have accepted the Council's position that the correspondence as a whole should be considered in relation to the exemption in section 36(1).
54. I accept that a client's requests for legal advice from their solicitor are covered by the exemption in section 36(1), and that the information can therefore be withheld unless it is in the public interest to release it.



55. As I have noted in a previous decision notice (023/2005), the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Many of the arguments in favour of maintaining confidentiality of communications were discussed in a House of Lords case, *Three Rivers District Council and others v Governor and Company of the Bank of England* (2004) UKHL 48.
56. There will always be a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client. As a result, I am likely only to order the release of such communications in highly compelling cases, and have not found any documents in this case where the public interest outweighs the principle of maintaining confidentiality.
57. Regarding documents 9/21 – 9/37, I consider that there is insufficient public interest in their contents to overturn the exemption in section 36(1). The subject matter of the emails relates only loosely to Mr Egan's request for emails about the closure of the school or the two public consultations which were carried out prior to its closure.

Documents 9/42 – 9/56

58. Document 9/42 consists of two emails relating to the consultation on the school closure, in the context of the forthcoming judicial review. The first email is purely administrative in nature and does not contain legal advice or reveal the Council's legal position. However, it is clear from the context in which it appears that it relates to the defence of the Council's position in the forthcoming legal proceedings, and I have therefore accepted that it should be exempt from disclosure under section 36(1) of FOISA. The second email was sent from a Council solicitor to a client department and again I accept that it is exempt under section 36(1). In both cases I found insufficient public interest in the contents to overturn the exemption.
59. Documents 9/49 – 9/54 are copies of correspondence between the Council and the law firm acting for the parent who was seeking the judicial review, and in this case I have found the content to be relevant to Mr Egan's information request. I accept that this correspondence sets out the position taken by the Council regarding certain matters relating to the judicial review proceedings, and as such is covered by confidentiality of communications. These documents are therefore exempt from disclosure under section 36(1), subject to the public interest test.



60. The Council has stated that it does not consider that there is any public interest served by disclosing the information in the documents discussed above. By the time Mr Egan made his request the school had already closed; the Council acknowledged that there was still local interest about this decision, but took the view that documents 9/49 – 9/54 related to an action in Court which had been addressed and concluded, and that there were no ongoing issues as a result of this action. The Council therefore took the view that there was no public interest in disclosure of the information in these documents.
61. Mr Egan has taken a different view, arguing that the Council should be accountable to tax payers for its actions regarding the mismanagement of the initial consultation process and in respect of the subsequent court action. He has stated that parents of children who previously attended Milton Primary School should be entitled to know the full reasons for the Council's decision to close the school, and has indicated that the Council's actions have left parents lacking confidence in the Council's decision-making process.
62. In cases such as these the applicant obviously has no knowledge of the contents of the documents withheld, and no way of assessing whether the public interest arguments he has put forward have any relevance to the information within them. Although the arguments advanced by Mr Egan are strong, they do not relate closely to the contents of all documents withheld from him.
63. I have therefore made my own assessment of the public interest issues in this case regarding these documents. In my published guidance on the public interest test I have indicated some of the possible factors which may inform a decision on whether disclosure would be in the public interest. I commented that one such factor to consider is:
- ” the general public interest that information is accessible i.e. whether disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation. This goes to the heart of freedom of information legislation. Without an adequate knowledge of the basis upon which decisions are made, the public will not have an opportunity to call public authorities to account...”
64. I concluded that there is no strong public interest in revealing the contents of documents 9/49 – 9/54. On balance, I am not satisfied that the information in these documents would improve the Council's accountability to the people it serves or that it would shed light upon its decision-making process. I therefore accept that in relation to documents 9/49 – 9/54 the public interest lies in upholding the principle behind the exemption in section 36(1), that communications between a solicitor and their client should generally remain confidential.



65. Document 9/55 is a covering email attaching the email correspondence (9/21 – 9/37) discussed above in paragraphs 54 - 59. My arguments in respect of documents 9/21 – 9/37 apply to document 9/55 and I do not require the Council to release this information to Mr Egan.

Documents 11/1, 11/2 – 11/5, 11/7 – 11/11 and 11/16 – 11/19

66. Documents 11/1 to 11/5 relate to the preparation of the Council's response to the legal aid application from the person who was seeking the judicial review.
67. Document 11/1 is an email sent from one Council solicitor to another, and I accept that the information is exempt under section 36(1) of FOISA, subject to the public interest test. I have not found anything in the contents which would significantly add to the general understanding of the Council's decision to close the school, and have concluded that there is insufficient public interest in the information to overturn the exemption in section 36(1).
68. The emails forming documents 11/2 – 11/5 were primarily exchanged between officials in the Education department but were copied in to some of the Council solicitors. I accept that the context in which these emails were sent shows them to be communications from the client department providing updated information to the solicitors from whom legal assistance and advice had been sought, and that the exemption in section 36(1) therefore applies.
69. Although the main focus of these documents is the Council's position regarding the legal aid application, the emails contain a significant amount of information relating to the school closure and therefore fall within the scope of Mr Egan's request. One of the emails is indicative of views which may have been relevant to the closure decision (and which do not appear to be in the public domain already) and therefore I accept that there would be some public interest in disclosure. I have, however, decided that such public interest as there is in disclosure is insufficient to outweigh the public interest in upholding the confidentiality of communications between a client and a solicitor, and accept that the information is exempt under section 36(1) of FOISA.
70. Documents 11/7 – 11/11 contain a draft of the Council's letter to the Scottish Legal Aid Board regarding the legal aid application referred to previously. I accept that at this stage, the letter was a working document sent by one solicitor for comment by another. As such, the exemption in section 36(1) applies. I have found that most of the contents of the letter duplicate information available in the consultation document issued by the Council, and there is therefore insufficient public interest in the information in this draft letter to override the exemption in section 36(1) of FOISA.



71. Document 11/16 – 11/19 is an annotated copy of 11/8 – 11/11, discussed above. I do not consider the public interest in the notes added to be sufficient to require their release, and therefore uphold the exemption in section 36(1) in respect of this document.

Communications relating to the preparations for the judicial review

72. Document 11/14 relates to the initial consultation carried out by the Council. As such, it relates to Mr Egan's request. However, it is a communication between two of the Council's solicitors relating to pending Court proceedings, and I accept that the exemption in section 36(1) applies. I do not consider there to be sufficient public interest in the information in this document to outweigh the exemption: it is a record of an internal discussion rather than information which would add to the public understanding of the Council's actions.
73. Documents 11/20 – 11/24 consist of an email with an attached list of people and public bodies consulted on the closure of Milton Primary School, showing the extent of the consultation carried out. Council solicitors were copied into the correspondence. The Council has argued that the email and attachments were provided to the solicitors from a Client department in order to keep them updated in the context of possible judicial review proceedings and that the exemption in section 36(1) therefore applies.
74. However, the email itself does not reveal anything about the context in which it was sent. There is no reference to its relevance to any legal proceedings or any request for legal advice. I therefore do not accept that this information should be exempt under section 36(1), and I require the Council to provide Mr Egan with a copy of the email and the attached document. In order to comply with the requirements of the Data Protection Act 1998 I require the Council to redact all home addresses (other than those of Councillors), and the names of pupils. I have taken into account the published guidance of the Information Commissioner responsible for Data Protection matters in limiting redaction of the list to the data described above.
75. Document 11/25 is an email providing legal advice about the disclosure of information from the distribution list discussed in the previous two paragraphs. I accept that this is exempt from disclosure in terms of section 36(1) of FOISA, and have found no public interest in the contents to outweigh the exemption.



76. Document 11/26 is a request for legal advice from a client department to one of the Council's solicitors, and as such, is covered by the exemption in section 36(1). Document 11/28 duplicates the content of 11/26. Document 11/27 is a communication from one solicitor to another which summarises part of the case to answer at the forthcoming judicial review of the consultation carried out by the Council on the closure plans. I accept that all three of these emails are covered by the exemption in section 36(1) of FOISA. Although the contents of these documents do relate loosely to Mr Egan's request, I do not consider the public interest in disclosure (as discussed previously in this decision notice) to be sufficient to outweigh the exemption.
77. Document 11/51 – 11/54 is the Council's request for legal opinion in respect of the proposed judicial review, in the form of a Memorial for the Opinion of Counsel. The document focuses on the legal position the Council would take in the forthcoming Court proceedings, but it also contains information more directly related to Mr Egan's request. I accept that this document is covered by the exemption in section 36(1), subject to the public interest test. After considering the contents, I do not believe that disclosure would add to the information already available to Mr Egan, and I find that there is insufficient public interest in disclosure of the information to outweigh the exemption in 36(1).
78. Documents 11/135 and 11/147 consist of legal advice from one council solicitor to another on consultation over school closures. As it is legal advice, I accept that the information is exempt from disclosure under section 36(1), subject to the public interest test. I have not found any public interest in the disclosure of this information which would outweigh the principle that the confidentiality of such communications should be upheld.
79. The Council withheld a series of emails exchanged with the legal counsel retained to defend its position during the judicial review of the first consultation. I have accepted that all these emails are exempt from disclosure under section 36(1). For the most part, the contents do not refer directly to the closure of the school or the consultation process. Where mention is made, I have found that the information is of insufficient public interest to overcome the exemption in 36(1). I have therefore decided that the Council was justified in withholding the following documents:

11/45; 11/48 – 11/50; 11/58 – 11/76; 11/78 – 11/80; 11/82 - 83; 11/96 -11/97; 11/109; 11/148 – 11/151; 11/154; 11/164 – 11/174; 11/176 – 11/180; 11/182 – 11/186.



80. The Council also withheld a series of emails (several of them duplicate documents) relating to its correspondence with Govan Law Centre regarding the Petition for a judicial review. The emails were exchanged between Council solicitors and consist of discussion and advice regarding the wording of letters outlining the Council's position. I accept that this correspondence is exempt from disclosure under section 36(1) of FOISA, and again have found nothing in the contents to outweigh the exemption.

Documents relating to provision of information to Council committees or the public

81. Documents 11/98 – 11/100 consist of three copies of the same email, sent by a Council solicitor from three different email accounts to other Council officers, including Council solicitors. As the email contains the solicitor's advice about the contents of the consultation document, I accept that it is exempt under section 36(1) of FOISA. I have not found that there would be sufficient public interest in the content to overturn the exemption.
82. Document 11/152 – 11/153 is an email suggesting wording with which to introduce an emergency agenda item for the meeting of the Children's Services Committee on 19 May 2004. As this constitutes advice prepared with legal guidance in relation to the Council's position in the judicial review proceedings, I accept that it is exempt from disclosure under section 36(1). I do not consider that the differences between the text proposed and the text appearing in the minutes are of sufficient public interest to outweigh the exemption.
83. Document 11/155 is an email sent from one solicitor to another, in the context of a discussion about the Children's Services Committee of 19 May 2004 and containing his views about the legal background to the decision to be taken at the meeting. The document is therefore exempt from disclosure under section 36(1), subject to the public interest test. I have not found any public interest in the disclosure of this information which would outweigh the principle that the confidentiality of such communications should be upheld.
84. Document 11/156 is a covering email enclosing a draft press release (document 11/157 – 11/159). Document 11/160 is a covering email enclosing the amended press release. As this advice was sought from and provided by one of the Council solicitors, I accept that the documents are covered by the exemption in section 36(1), and have not found sufficient public interest in the amendments made to outweigh the exemption.



85. Documents 11/187 – 11/242 are covering emails sent with various drafts of a report submitted to the Special Services Committee of 23 June 2004, plus supporting documentation outlining the suggested amendments. The document was created in part by one of the Council solicitors, and his comments, suggestions and opinions are documented as highlighted areas within the drafts. I accept that these documents are covered by the exemption in section 36(1), and have not found sufficient public interest in the amendments suggested to outweigh the exemption.

Information withheld under section 30(b)(i) and (ii)

86. A few documents have been withheld from Mr Egan on the grounds that they are exempt from disclosure under either or both of the exemptions in section 30(b) of FOISA. Section 30(b)(i) permits public authorities to withhold information if disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice. Section 30(b)(ii) similarly exempts information if its disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. In both cases the exemption cannot be upheld if the public interest in disclosure is greater than the public interest in upholding the exemption.
87. Document 11/87 is a covering email enclosing document 11/88 – 11/95, a draft of the consultative document issued in relation to the closure of Milton Primary School. The Council has argued that this was a working document and that while the finalised, formal consultative document would be made publicly available through a report submitted to the Council, it would be inappropriate to disclose work in progress as the documents do not necessarily reflect the final position adopted by the Council or advice given to the Council. It has been withheld under section 30(b)(ii) of FOISA.
88. Document 11/101 – 11/108 is an amended and annotated version of document 11/88 – 11/95, the changes having been made by a Council solicitor in the context of the pending judicial review. It has been withheld under section 30(b)(ii) of FOISA and also the exemptions in sections 30(b)(i) and 36(1) of FOISA.
89. The Council has not provided any specific reasons why it considers that disclosure might substantially inhibit officials from exchanging views for the purposes of deliberation or substantially inhibit officials from providing advice in future. However, it has expressed the view that officials should have the opportunity to discuss and debate working documents before the finalised version is presented.



90. The Council has described the changes made to the document as minor, and for this reason I do not accept that officials would be substantially inhibited in providing similar advice or views in future, should disclosure be required. I therefore do not accept that the exemptions in section 30(b)(i) and (ii) of FOISA apply to either document 11/87 – 11/95 or document 11/101 – 11/108. I require the Council to provide Mr Egan with a copy of document 11/87 – 11/95.
91. Document 11/101 – 11/108 has also been withheld under section 36(1) of FOISA. I accept that the amendments proposed by the Council solicitor constitute legal advice, and that the exemptions in section 36(1) applies. As noted above, the changes proposed are not substantial and I do not consider there to be sufficient public interest in the amendments to outweigh the exemption, given that the final consultation document is publicly available. I therefore accept that document 11/101 – 11/108 should be withheld under section 36(1) of FOISA.
92. Document 11/181 is an email sent within the Education Department, copied to one of the Council solicitors. The Council has described it as a document created to update all parties in relation to the ongoing position with Milton Primary School, and as a working document on which a future briefing note for certain Councillors would be based. The information was initially withheld under section 30(b)(ii) on the grounds that disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. However, during the course of the investigation the Council withdrew its reliance on this exemption and agreed to release the document. I now require the Council to provide Mr Egan with a copy.

Emails not “held” for the purposes of FOISA (section 3(2)(a)(i))

93. The Council retrieved some emails which it described as “created by a Councillor carrying out his functions for his constituents”. The Council noted “As they are not created by the Council in the ordinary course of business then they are not subject to the disclosure rules”.
94. Many councils are likely to hold information on behalf of a councillor. For example, a council may allow a councillor to use its IT system for writing and storing correspondence with and on behalf of constituents. Some councils provide councillors with administrative support.



95. There do not appear to be any set rules on when a councillor is and is not acting on behalf of a council, although the Councillors' Code of Conduct from the Standards Commission for Scotland draws a clear distinction between Council duties and party political or campaigning activities. I have taken the view that information relating to a Councillor's party political activities or constituency business is not held by the Council for the purposes of FOISA; only information relating to activities in which the Councillor is acting on behalf of the Council is covered by the legislation. In coming to this view I have taken account of the Information Commissioner's guidance on the implications of the Data Protection Act for Councillors. This guidance appears to suggest that that only when the Councillor is acting as a member of the Council (i.e. in pursuance of its corporate functions) are they part of the Council.
96. In this case the Council has withheld two emails which relate to clerical support provided to a Councillor by a Council employee. The heading "Milton Primary School" relates not to the content of the emails themselves but to the document attached to the emails, which is a draft letter from the Councillor (acting as a representative of his constituents rather than on behalf of the Council) to the Acting Director of Education and Cultural Services.
97. I accept the Council's view that the draft version of the letter attached to the Councillor's email is not "held" for the purposes of FOISA. It was sent to the Council employee responsible for providing secretarial support to the Councillor in order to have amendments made, and as such, it is not information provided by a Councillor acting on behalf of the Council.
98. If the final version of the letter was actually sent to the Acting Director of Education and Cultural Services and is still held by the Council it would be covered by FOISA; however, it would not be covered by Mr Egan's current request, which asked only for emails with the subject heading "Milton Primary School".

Decision

I find that, for the most part, West Dunbartonshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to Mr Egan's information request.

I find that the Council's initial response to Mr Egan failed to comply with section 16 of FOISA, in that it did not cite the relevant sections of FOISA under which information had been held to be exempt.



I find that the Council misapplied the exemption in section 30(b)(ii) of FOISA to document 11/87 – 11/95 and I require the Council to release this document to Mr Egan.

I find that the Council misapplied the exemption in section 36(1) of FOISA to document 11/20 – 11/24 and I require the Council to release this document to Mr Egan.

I also require the Council to provide Mr Egan with a copy of document 11/181 following its decision to withdraw its reliance upon the exemption in section 30(b)(ii) of FOISA.

As I cannot require West Dunbartonshire Council to comply with this decision notice within the appeal period of 42 days, I require the Council to take these steps within 45 days of this notice.

Kevin Dunion
Scottish Information Commissioner
03 July 2006